



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

THEODORE A. SMITH,  
Petitioner,

vs.

UNITED STATES OF AMERICA,  
Respondent.

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CIVIL ACTION NO. 3:05-0198-26BC

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ORDER ADOPTING THE REPORT AND RECOMMENDATION OF  
THE MAGISTRATE JUDGE AND DISMISSING THE ACTION WITHOUT PREJUDICE  
AND WITHOUT REQUIRING RESPONDENT TO FILE A RETURN

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This is a Section 2241 action. Petitioner is proceeding *pro se*. The matter is before the Court for review of the report and recommendation (report) of the United States Magistrate Judge in which he suggests that the action be dismissed without prejudice and without requiring Respondent to file a return. The report is made in accordance with 28 U.S.C. § 636 and Local Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *See Matthews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a *de novo* determination of those portions of the report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. *See* 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed his report on January 26, 2005. Petitioner timely filed his objections to the report on February 7, 2005. The Court is of the opinion, however, that Petitioner's objections lack merit.<sup>1</sup>

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<sup>1</sup>For a full recitation of the relevant facts of this case, the reader is directed to the "Background" section of the report at pages 1-2.

Simply stated, and as observed by the Magistrate Judge, “The Petitioner’s reliance upon 18 U.S.C. § 3161 is clearly misplaced.” Report at 2. Moreover, Petitioner has failed to exhaust the mandatory administrative relief procedures established by the Federal Bureau of Prisons. Report at 4. “The requirement for exhaustion of remedies in the present context cannot be waived. *Id.* (citations omitted).

Therefore, after a thorough review of the report and the record in this case pursuant to the standards set forth above, the Court adopts the report and incorporates it herein. Hence, it is the judgment of this Court that this action must be **DISMISSED** *without prejudice* and without requiring Respondent to file a return. Any remaining pending motions are rendered **MOOT**.

**IT IS SO ORDERED.**

Signed this 21<sup>st</sup> day of April, 2005, in Spartanburg, South Carolina.

s/ Henry F. Floyd  
HENRY F. FLOYD  
UNITED STATES DISTRICT JUDGE

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**NOTICE OF RIGHT TO APPEAL**

Petitioner is hereby notified that he has a right to appeal this Order within sixty (60) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.